

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

ACTIVEVIDEO NETWORKS, INC.,)
Plaintiff,)
v.) Case No. 2:10-cv-00248-RAJ-FBS
VERIZON COMMUNICATIONS INC.,) PUBLIC VERSION
VERIZON SERVICES CORP.,)
VERIZON VIRGINIA INC., and)
VERIZON SOUTH INC.,)
Defendants.)

)

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

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I. STATEMENT OF UNDISPUTED FACTS

This Statement of Undisputed Facts is submitted in compliance with Eastern District of Virginia Local Rule 56(B).

¹ Verizon has concurrently filed a Motion for Leave to Amend Answer to include the defenses of license and release based on the recently discovered ActiveVideo-TV Guide Agreement.

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II. STANDARD FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56(a), a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

To avoid summary judgment, a plaintiff must present “specific facts showing that there is a *genuine issue for trial.*” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted; emphasis in original); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). “A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes.” *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985); *see Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir.

1993); *Guinness PLC v. Ward*, 955 F.2d 875, 883 (4th Cir. 1992); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987); *see also Estate of Kimmell v. Seven Up Bottling Co. of Elkton, Inc.*, 993 F.2d 410, 412 (4th Cir. 1993) (nonmovant must show “specific” facts justifying a trial). Because there are no genuine issues for trial on the defenses of release and license, the Court should grant Verizon’s motion for summary judgment.

III. ARGUMENT

ActiveVideo's First Amended Complaint asserts claims of patent infringement against four Verizon defendants. *See supra* Section I.D., ¶ 33. [REDACTED]

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² Covenants not to sue are recognized as a basis for dismissing an action. In the context of declaratory judgment actions, for example, the Federal Circuit has repeatedly and consistently held that a covenant not to sue for patent infringement divests the trial court of subject matter jurisdiction because the covenant eliminates any case or controversy between the parties. See *Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054, 1060 (Fed. Cir. 1995); see also *Dow Jones & Co. v. Ablaise Ltd.*, 606 F.3d 1338, 1346-47 (Fed. Cir. 2010); *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1354-55 (Fed. Cir. 2007); *Intellectual Prop. Dev., Inc. v. TCI Cablevision of Calif., Inc.*, 248 F.3d 1333, 1342 (Fed. Cir. 2001) (statement of non-liability divested the district court of Article III jurisdiction); *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 855 (Fed. Cir. 1999).

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IV. CONCLUSION

Dated: January 31, 2011

Respectfully submitted,

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VERIZON SERVICES CORP.,
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VERIZON SOUTH INC.**

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